

June 4, 2009

Daniel J. Kramer
8041 Scotts Store Rd.
Greenwood, DE 19950

**RE: Freedom of Information Act Complaint
Against Sussex County**

Dear Mr. Kramer:

On April 7, 2009 the Delaware Department of Justice (“DDOJ”) received your April 1, 2009 complaint that Sussex County (“the County”) violated the Freedom of Information Act (“FOIA”) in responding to your FOIA request to review specified email and text messages. On April 9, 2009, the DDOJ forwarded your letter to the County. We received their response on May 1, 2009. We requested additional information from the County, and received its timely response on May 11, 2009. This is the DDOJ’s determination of your complaint pursuant to 29 *Del. C.* § 10005(e).

RELEVANT FACTS

By letter of January 23, 2009 to the President of the Sussex County Council (“Council President”), you requested all email and text messages dated between August 15, 2008 and January 22, 2009, among and between the Council President, the Sussex County Administrator, the Sussex County Assistant Administrator and six current or

former Council representatives. By letter of February 5, 2009 the County Administrator advised you that the County would not be providing the documents within ten days of your request, because the records would be reviewed by the County Administrator, “the persons involved in those communications, and by legal counsel in order to determine which of the documents are subject to disclosure as matters of ‘public record.’” By letter to you of March 24, 2009 the County Administrator wrote that it would take 8 hours at \$28.39 per hour—or \$227.12—for the County to “attain from [the County’s] computer network system” the information you requested, and payment was requested in order for the County to “finish the work needed to be done to provide those e-mail messages for your review.” The letter also stated that the County “would make available for your review e-mails which fall within the FOIA definition of ‘public record’ and which are not covered by any exceptions to that definition.”

In your April 1, 2009 complaint you question whether the County can charge for document review “when there is none,” and whether the County can withhold emails that are public records. You also object to the County’s delay in providing you with the emails and text messages you requested.

In response to your complaint, the County explained that it “does not have the ability to access text messages that may have been sent from a cell phone unless they were received as an email through a county email account. In order to access e-mails . . . it was necessary for the County to manually go into each person’s e-mail account and insert search criteria to retrieve all messages ‘to’ each person and ‘from’ each person occurring between August 15, 2008 and January 22, 2009.” Each email is then printed and scanned, and the resulting PDF file is reviewed to determine if any emails are not

“public records.” The County estimates 1,180 pages of paper records would be generated by your FOIA request. At the \$0.30 per page rate for copying that is authorized by the County’s Public Record Access Regulations, the cost of providing paper copies would be \$354. As an alternative, the County offered to provide a CD of the records and charge \$227.12, representing eight hours of work at the hourly charge of \$28.39 for a County employee to retrieve the emails. The County notes that employee is the lowest paid of the three employees who are qualified and authorized to perform such work.

RELEVANT STATUTES

29 *Del. C.* § 10003(a) provides that “[a]ll public records shall be open to inspection and copying . . . during regular business hours . . . [that r]easonable access to and reasonable facilities for copying these records shall not be denied . . . [and that a]ny reasonable expense involved in the copying of such records shall be levied as a charge on the citizen requesting such copy.” “If the record is . . . in storage and, therefore, not available at the time a citizen requests access, the custodian shall so inform the citizen and make an appointment for said citizen to examine such records as expediently as they may be made available.” *Id.* “Public record” is defined in 29 *Del. C.* § 10002(g), and there are 17 subsections to section 10002(g) that describe records that “shall not be deemed public.”

DISCUSSION

The definition of a public record under FOIA does not depend on the “physical form or characteristic by which such information is stored, recorded or reproduced,” 29 *Del. C.* § 10002(g), and Sussex County properly treats electronically stored information

as subject to FOIA. The County is also correct that, as with paper records, electronically stored information is subject to public access only if it fits the definition of public record in 29 *Del. C.* § 10002(g), and is not subject to an exclusion listed in 29 *Del. C.* § 10002(g)(1)-(17). The public body is entitled to a reasonable time in which to review requested records to determine if they are subject to public access. The reasonableness of the time depends on the amount of information requested and who has to review it—in this case, the County reasonably wants the emails to be reviewed by the County Attorney, as well as by the County Administrator and by the people whose emails are requested. FOIA only requires that the public have “reasonable access” to public records. 29 *Del. C.* § 10003(a). The time required to produce records in response to a public request necessarily varies with the nature and scope of the request.

It seems that you believe that because you only want to “review” the emails, you should not have to pay for the cost of retrieving them. Electronically stored information cannot be reviewed until it is accessed and put in reviewable form—in this case that process took eight hours of employee time. In *Del. Op. Atty. Gen.* 07-IB19, 2007 WL 4732802 (Del. A.G. Aug. 28, 2007) we determined that a public body with a written policy relating to charges for retrieving electronic data could recover the direct costs incurred in retrieving the records. We have previously determined the County may charge for electronic records according to its Public Record Access Regulations , which authorize fees for “county employee time in obtaining and reproducing public records, beyond routine photocopying.” *Del. Op. Atty. Gen.* 08-IB14, 2008 WL 5501280 (Del. A.G. Dec. 14, 2008). The County, therefore, has a written policy, and has demonstrated

the reasonableness of what it will charge for retrieving the records you want to see. It is reasonable for the County to require the charges to be paid before it provides the records.

CONCLUSION

For the reasons stated herein, Sussex County has not violated the Freedom of Information Act by levying a reasonable charge for the actual cost of an employee obtaining electronic records, or in requiring that the requesting party remit that cost before receiving access to the records.

Sincerely,

Judy Oken Hodas
Deputy Attorney General

Approved:

Lawrence W. Lewis, State Solicitor

cc: Sarah Murray, Opinion Coordinator
James D. Griffin, Esquire